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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 503

GUS FARBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 210–222) is reported in 114 F. (2d) 5.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 27, 1940 (R. 223), and a petition for rehearing was denied September 16, 1940 (R. 224). The petition for a writ of certiorari was filed October 14, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

1. Whether the portions relating to gold coin of Section 5 (b) of the Trading With the Enemy Act, as amended, and Executive Order No. 6260, as amended, which were issued thereunder, were superseded and abrogated by the Gold Reserve Act of 1934 and the Provisional Regulations promulgated thereunder.

2. Whether Section 5 (b) of the Trading With the Enemy Act, as amended, insofar as it relates to gold coin, is unconstitutional because of delegation of legislative power to the President.

STATUTES, ORDERS, AND REGULATIONS INVOLVED

The pertinent portions of these are copied in the Appendix, *infra,* pp. 16–19.

STATEMENT

On May 4, 1939, an indictment in two counts was returned against the petitioner and others in the District Court for the Northern District of California (R. 1–4). The first count charged that the defendants wilfully, unlawfully, and knowingly acquired thirteen genuine twenty-dollar gold coins of the United States without a license issued in accordance with Executive Order No. 6260, as amended (Appendix, *infra,* p. 17), in violation of

Section 5 (b) of the Trading With the Enemy Act, as amended (Appendix, *infra*, p. 16). The second count charged them with a conspiracy unlawfully to acquire gold coin. The petitioner was convicted under the first count and acquitted under the second (R. 7), and was sentenced to imprisonment for a period of six months and to pay a fine of $1,000 (R. 8). On appeal, the Circuit Court of Appeals for the Ninth Circuit unanimously affirmed the judgment of conviction (R. 210–223) and denied rehearing (R. 224).

ARGUMENT

I

Petitioner does not here question that there was sufficient evidence to warrant the jury in finding that he wilfully acquired genuine gold coins of the United States without having a license, in violation of Section 5 (b) of the Trading With the Enemy Act, as amended, and Executive Order No. 6260, as amended. His contention is that he should not have been prosecuted under Section 5 (b) and the Executive Order because, so far as gold coin is concerned, they were superseded prior to the commission of the offense charged in the indictment by the later Gold Reserve Act of 1934 and the Provisional Regulations issued thereunder by the Secretary of the Treasury.

There was no express repeal or abrogation of the earlier statute and Executive Order, but the petitioner contends that by Section 3 of the Gold Re-

serve Act the power to formulate regulations on the subject of gold coin was removed by Congress from the jurisdiction of the President and conferred upon the Secretary of the Treasury, and that the Provisional Regulations of the Secretary of the Treasury were intended to supplant the prior Executive Order. In support of this the petitioner points to the similarity of language employed in the two statutes. He also relies upon the so-called savings provisions of Section 13 of the Gold Reserve Act and upon certain documents which were before the Senate Committee which recommended passage of the Gold Reserve Act. He further relies upon an alleged inconsistency between the Executive Order and the Provisional Regulations with reference to the classes of persons exempted from the licensing requirements.

We submit that the Circuit Court of Appeals correctly held that the Gold Reserve Act of 1934 and the Provisional Regulations promulgated thereunder did not supersede Section 5 (b) of the Trading With the Enemy Act, as amended, and Executive Order No. 6260, and hence that the petitioner was properly prosecuted and convicted under their provisions.

By Section 5 (b) of the Trading With the Enemy Act, as amended (Appendix, *infra*, p. 16), Congress gave the President the power during time of war or other period of national emergency to regulate or prohibit the export, hoarding, melting, or earmarking of gold coin, and provided criminal

punishment for anyone who wilfully violated the regulations issued thereunder. Section 3 of the Gold Reserve Act (Appendix, *infra*, p. 18) gave the Secretary of the Treasury the power, by regulations approved by the President, to prescribe the conditions under which gold could be acquired and held, transported, melted or treated, imported, exported, or earmarked. However, no criminal sanction was provided for the violation of such regulations. Where gold was acquired contrary to the Secretary's Regulations, or a license issued thereunder, provision was made by Section 4 (Appendix, *infra*, p. 18) for the forfeiture of the gold and for the imposition of a penalty equal to twice the value of the gold involved.

While the statutory provisions in question are overlapping, they are not mutually exclusive. It clearly was not the intention of Congress in enacting Sections 3 and 4 of the Gold Reserve Act of 1934 to repeal by implication Section 5 (b) of the Trading With the Enemy Act, as amended. On the contrary, Congress in enacting Sections 3 and 4 obviously intended to confer upon the Secretary of the Treasury powers to act with respect to gold in addition to, and not to the exclusion of, the powers over gold theretofore granted to the President. The powers of the President under Section 5 (b) of the Trading With the Enemy Act, as amended, are to be exercised only "during time of war or during any other period of national emergency." No such emergency is necessary to bring into play

the powers vested in the Secretary of the Treasury by Section 3 of the Gold Reserve Act. The conditions under which the President and Secretary of the Treasury may act are independent and the sanctions are in one instance civil and in the other criminal.

The Act of March 9, 1933 (48 Stat. 1), amended Section 5 (b) of the Trading With the Enemy Act, as amended.[1] Yet Section 3 of the 1933 Act, amended Section 11 of the Federal Reserve Act by adding a new subsection (n) which provided in part:

> Whenever in the judgment of the Secretary of the Treasury such action is necessary to protect the currency system of the United States, the Secretary of the Treasury, in his discretion, may require any or all individuals, partnerships, associations, and corporations to pay and deliver to the Treasurer of the United States any or all gold coin, gold bullion, and gold certificates owned by such individuals, partnerships, associations, and corporations. * * *

Thus in the same Act Congress conferred upon the President and the Secretary of the Treasury separate powers to deal with the hoarding of gold. The conditions under which the President and Secre-

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[1] Section 2 of that Act so amended Section 5 (b) of the Trading With the Enemy Act, as amended, as to authorize the President "during time of war or during any other period of national emergency" to "investigate, regulate, or prohibit * * * hoarding * * * of gold * * * coin or bullion or currency."

tary were to act, while overlapping, were independent. Acting under the separate powers so conferred, the President and the Secretary each took valid action to deal with the hoarding of gold.[2] Sections 3 and 4 of the Gold Reserve Act occupy the same general field as does Section 3 of the Act of March 9, 1933. By their enactment, therefore, Congress did not intend to deprive the President of the powers over gold vested in him by Section 5 (b) of the Trading With the Enemy Act, which was amended simultaneously with the enactment of Section 3 of the Act of March 9, 1933.

Again, Public Resolution No. 69, 76th Congress, approved May 7, 1940, further amended Section 5 (b) and yet retained the provisions relating to gold unchanged. This is conclusive of the fact that

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[2] Executive Order No. 6102 of April 5, 1933 (Appendix to Petitioner's Brief, pp. 16–19); Executive Order No. 6260 of August 28, 1933, as amended (Appendix to Petitioner's Brief, pp. 19–27, 29); Order of the Secretary of the Treasury of December 28, 1933, as amended and supplemented (Appendix to Petitioner's Brief, pp. 27–28). See *Norman* v. *B. & O. R. Co.*, 294 U. S. 240; *Nortz* v. *United States*, 294 U. S. 317; *Perry* v. *United States*, 294 U. S. 330. In *British American Tobacco Co. Ltd.* v. *Federal Reserve Bank of New York* (S. D. N. Y., opinion unreported); affirmed (C. C. A. 2d), 104 F. (2d) 652, 105 F. (2d) 935, certiorari denied, 308 U. S. 600, it was specifically determined that the President possesses the power under Section 5 (b) of the Trading With the Enemy Act, as amended, to regulate the hoarding of gold, notwithstanding the fact that the Secretary of the Treasury has authority to deal with the same subject under the amendment to the Federal Reserve Act made by Section 3 of the Act of March 9, 1933.

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Congress by enacting Sections 3 and 4 of the Gold Reserve Act did not intend to repeal that part of Section 5 (b) of the Trading With the Enemy Act, as amended, relating to gold. Indeed, in this Joint Resolution Congress expressly approved and confirmed Executive Order No. 8389, dated April 10, 1940, and regulations and general rulings issued thereunder. Executive Order No. 8389 prohibited, except as authorized in regulations or licenses issued by the Secretary of the Treasury, the following transactions, among others, if involving property in which Norway or Denmark or any national thereof has had any interest at any time on or since April 8, 1940:

> The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States.[3]

Congress has thus expressed in an unequivocal manner its intention that the powers with respect to gold conferred upon the President by Section 5 (b) of the Trading With the Enemy Act, as amended, shall continue in full force and effect.

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[3]Amendments to Executive Order No. 8389 made since the adoption of Public Resolution No. 69 have so extended the above-quoted restrictions on gold transactions, among others, as to make them applicable with respect to the Netherlands, Belgium, Luxembourg, France, Latvia, Estonia, Lithuania, and Rumania, and nationals thereof. Executive Order No. 8405, dated May 10, 1940; Executive Order No. 8446, dated June 17, 1940; Executive Order No. 8484, dated July 15, 1940; Executive Order No. 8565, dated October 10, 1940.

A further reason indicating that there was no implied repeal are the well settled rules that Congress may impose both a criminal and a civil sanction in respect to the same act or omission (*Helvering* v. *Mitchell,* 303 U. S. 391, 399–400), and that a statute imposing a civil sanction will not be construed to repeal by implication a statute imposing a criminal sanction for the same act or omission, or *vice versa,* in the absence of a clear legislative intent. *Stockwell* v. *United States,* 13 Wall. 531, 552; cf. *United States* v. *Claflin,* 97 U. S. 546, 552–553. See also *Harvey* v. *State,* 5 Ind. App. 422; *Reg.* v. *Wigg,* 2 Salk. 460; *Gray* v. *Cookson,* 16 East. 13; *Rex* v. *Robinson,* 2 Burr. 799. Petitioner makes no showing of any such intent with respect to the statutes here involved.[4]

On the contrary, when Congress by Section 13 of the Gold Reserve Act of 1934 (Appendix, *infra,* p. 19) approved, ratified and confirmed all regulations, orders, etc., promulgated and issued pursuant to the amendment in 1933 of the Trading With the Enemy Act, it presumably recognized the continued existence and validity of that Act and of the orders issued thereunder. Cf. *United States* v. *71.41 Ounces Gold Filled Scrap,* 94 F. (2d) 17, 18

[4] *United States* v. *Yuginovich,* 256 U. S. 450, and *United States* v. *Tynen,* 11 Wall. 88, cited by the petitioner, are clearly not in point since in those cases both of the statutes involved were criminal statutes and the later one covered the same subject matter and made provision for or permitted a smaller criminal punishment.

(C. C. A. 2d); *Ruffino* v. *United States,* 114 F. (2d) 696 (C. C. A. 9th).

There is nothing in the documents before the Senate Committee which recommended passage of the Gold Reserve Act, referred to by the petitioner (Appendix to Petitioner's Brief, pp. 2–5), that discloses any intention to repeal any provision of Section 5 (b) of the Trading With the Enemy Act, as amended, or to abrogate any provision of the Executive Order issued thereunder. Indeed, a portion of the President's Message not quoted by the petitioner (Senate Document No. 114, p. 1, 73d Cong., 2d Sess.) refers to the proposed legislation as "additional legislation," and it is stated in that part of the message quoted by the petitioner (Appendix to Petitioner's Brief, p. 4) that "Certain amendments of existing legislation relating to the purchase and sale of gold and to other monetary matters would add to the convenience of handling current problems in this field."

Petitioner discusses at considerable length an alleged differentiation in the treatment by the Executive Order under the Trading With the Enemy Act, as amended, and the later Provisional Regulations under the Gold Reserve Act of those who acquire rare and unusual coin, apparently in support of the view that the Provisional Regulations were intended to supplant the Executive Order.[5] The

[5] Section 4 of Executive Order No. 6260, as amended (Appendix, *infra*, p. 17), provided "that *collectors* of rare and unusual coin may acquire *from one another* and hold with-

Order and Regulations are clearly intended to stand together. It is apparent that a holding of gold in accordance with the conditions of the Gold Reserve Act and the Regulations issued thereunder would not violate the prior gold orders, including Executive Order No. 6260 of August 28, 1933; the Act and Regulations would operate in such a case to permit the holding of gold which, without such permission, might be in violation of the earlier orders.[6] In any event, whether or not there was an implied repeal of Executive Order No. 6260, so far as it covers transactions involving coins of recognized value to collectors, this cannot aid petitioner. He states that "The record, beyond any question of doubt, conclusively establishes that the gold coin involved in the instant case had a value, beyond their gold content, to collectors of rare and unusual coins" (Br. 16). But there was testimony

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out necessity of obtaining a license therefor gold coin having a recognized special value to collectors of rare and unusual coin." Section 20 of the Provisional Regulations under the Gold Reserve Act of 1934 (Appendix, *infra*, p. 19), does not restrict the unlicensed transactions in such coins to those who are collectors.

[6] In this connection it is to be observed that the Treasury Department has always regarded Executive Order No. 6260 as remaining in full force and effect as indicated (with certain exceptions immaterial here), and that the continued administrative practice of that Department has been governed accordingly. This view has been expressed in several communications from the Treasury Department to the Department of Justice in connection with cases in which prosecutions for violations of Executive Order No. 6260 of August 28, 1933, were instituted.

that the coin was not of this character (R. 74), and, as was pointed out in the opinion of the Circuit Court of Appeals (R. 216), the jury was instructed that they must acquit the petitioner if they found "from the evidence that the gold coins in question had a recognized special value to collectors of rare and unusual coin, and were acquired because of this recognized special value to collectors of rare and unusual coin, and not solely for the purpose of acquiring the gold bullion contained in said coins" (R. 145–146). It is evident therefore that the jury in returning a verdict of guilty found of necessity that the coins were not gold coins having a recognized special value to collectors of rare and unusual coin. Since the petitioner does not attack this finding he stands in the position of having acquired ordinary gold coins without having obtained a license and consequently was not exempted under either the Executive Order or the Provisional Regulations.

II

The petitioner further contends that Section 5 (b) of the Trading With the Enemy Act, as amended, is unconstitutional because it delegated legislative power to the President. He asserts that the Act fixed no standard or policy for the regulation or prohibition of the acquisition of gold coin. It does not appear that this contention was made in the trial court, and it is not mentioned in the grounds of appeal (R. 10–13) or in the assign-

ments of error (R. 173–201) in the Circuit Court of Appeals, in the briefs before that court, or in the court's opinion (R. 210–222). Moreover, we submit that the contention is without merit.

Section 5 (b) (Appendix, *infra,* p. 16) provides that during time of war or during any other period of national emergency declared by the President, the President may investigate, regulate, or prohibit under such rules and regulations as he may prescribe by means of licenses, or otherwise, any transactions in certain fields including gold hoarding. The first section of Executive Order No. 6260 issued thereunder (Appendix, *infra,* p. 17) states that under the authority vested in him by Section 5 (b) the President declares a period of national emergency to exist, and the following sections prescribe certain provisions for the investigation and regulation of the hoarding, etc., of gold coin, gold bullion, and gold certificates. In Section 5 (b) Congress has indicated its policy that during wartime or periods of national emergency gold hoarding shall be investigated, regulated, or prohibited by the President, and by the Executive Order the President merely discharged the administrative function vested in him by the statute of carrying out the congressional policy of subjecting transactions in gold to the controls required to meet the emergency as it arose. Plainly, the need for prompt action would preclude Congress from formulating detailed standards after the emergency arose, and justified its grant of broad discretion to the President. Cf.

United States v. *Grimaud,* 220 U. S. 506, 517; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 428–429. The statute, not the President, declares the policy, creates the offense, and fixes the penalty. The only cases directly passing upon the question hold that Section 5 (b) does not unduly delegate legislative power to the President. *Campbell* v. *Chase Nat. Bank of the City of New York,* 5 F. Supp. 156, 173 (S. D. N. Y.), and *United States* v. *Driscoll,* 9 F. Supp. 454, 456 (D. Mass.). Such a view seems also to have been implicit in *Perry* v. *United States,* 294 U. S. 330, 355–356.

But, whatever the objections petitioners might have raised to the breadth of the powers given the President by Section 5 (b) of the Trading with the Enemy Act, any defects would have been cured by Section 13 of the Gold Reserve Act of 1934 (Appendix, *infra,* p. 19) which in terms declares that "All actions, regulations, rules, orders, and proclamations heretofore" taken, made or issued by the President under the Act of March 9, 1933 [which amended Section 5 (b) of the Trading with the Enemy Act] "are hereby approved, ratified, and confirmed." Executive Order 6260 was promulgated prior to the enactment of Section 13 and cannot, therefore, now be attacked as the exercise of a legislative power unlawfully delegated (*Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 301–302, and cases cited).

CONCLUSION

The case was correctly decided by the Circuit Court of Appeals and there is involved no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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